

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FILED

MAY 26 2017

CLERK, US DISTRICT COURT
NORFOLK, VA

FRANKIE M. MILLER, JR. (#1070339),

Petitioner,

v.

ACTION NO. 2:16cv645

HAROLD W. CLARKE, Director,
Virginia Department of Corrections,

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition alleges violation of federal rights pertaining to petitioner's convictions on June 19, 2003, in the Henrico County Circuit Court, for capital murder and aggravated malicious wounding. As a result of the convictions Petitioner was sentenced to serve two life terms in prison following his guilty plea.

The matter was referred to a United States Magistrate Judge for report and recommendation pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia. The Report and Recommendation, filed April 28, 2017, concludes the petition is time-barred and the claims procedurally defaulted, and

recommends it be denied and dismissed. Each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. On May 8, 2017, the court received petitioner's Objections to the Report and Recommendation. The respondent filed no response to the objections and the time for responding has now expired.

The court, having reviewed the record and examined the objections filed by petitioner to the Report and Recommendation, and having made de novo findings with respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the Report and Recommendation filed April 28, 2017.¹ It is, therefore, ORDERED that Respondent's Motion to Dismiss be GRANTED and the Petitioner's petition be DENIED and DISMISSED with prejudice.

Petitioner is hereby notified that he may appeal from the judgment entered pursuant to this Final Order by filing a written notice of appeal with the Clerk of this court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty (30) days from the date of entry of such judgment.

¹ Petitioner's objections identified a factual error in the Report that does not affect its analysis. The Magistrate Judge stated that Miller's trial counsel referred to a forensic mental health evaluation during sentencing. It appears from the transcript that the referenced report may have been a competency evaluation which was different from the forensic mental health evaluation. But Miller does not dispute the Report's conclusion that the forensic evaluation was received by his attorney in 2003, and that his 2009 receipt of the same document would not have rendered his 2016 filing timely. Report & Recommendation (ECF No. 16 at 5-6, n. 6) (citing 28 U.S.C. § 2244(d)(1)).

Petitioner has failed to demonstrate a substantial showing of the denial of a constitutional right, therefore, the Court declines to issue any certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. See Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003).

The Clerk is directed to mail a copy of this Final Order to petitioner and provide an electronic copy of the Final order to counsel of record for respondent.

/s/MSD

MARK S. DAVIS
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

May 26, 2017